

DEPARTMENT OF STATE REVENUE**LETTER OF FINDINGS NUMBER: 96-0498 RO**
Responsible Officer Liability-Duty to Remit Sales and Withholding Taxes
For Years 1992 and 1993

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES**I. Responsible Officer Liability-Duty to Remit Sales and Withholding Taxes**

Authority: IC § 6-2.5-2-2; IC § 6-2.5-9-3; IC § 6-3-4-8;
Indiana Department of Revenue v. Safayan, 654 N.E.2d
270,273 (Ind. 1995)

Taxpayer protests the Department's determination of responsible officer liability for sales and withholding taxes not paid during the assessment period.

STATEMENT OF FACTS

Taxpayer, a businessman with an existing home construction business, incorporated a business in Indiana in 1991 (hereinafter 'corporation'). Taxpayer was listed as president on the incorporation papers. In November of 1991, taxpayer filled out and signed the Indiana Department of Revenue Business Tax application. The taxpayer listed his title as president of the corporation. The last lines of the Business Tax Application read as follows:

I hereby certify that the statements are correct.

This application must be signed by the owner, general partner or corporate officer before the Department will accept it.

NOTE: Failure to remit sales tax due and/or income tax withheld is a felony punishable by imprisonment for two (2) years and a fine of \$10,000.00.

After the first line (I hereby certify...) the form asks for a signature, title, and date. Taxpayer signed the form, listed himself as president, and dated the form.

Taxpayer notified the Indiana Department of Revenue of his resignation as the president of the corporation in September of 1993.

I. Responsible Officer Liability–Duty to Remit Sales and Withholding Taxes

DISCUSSION

A gross retail (sales) tax is imposed on retail transactions made in Indiana. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must “collect the tax as agent for the state.” IC § 6-2.5-2-2

Individuals may be held personally responsible for failing to remit any sales tax. In determining who may acquire personal liability, IC § 6-2.5-9-3 is pertinent:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in IC § 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes to the state.

An income tax is assessed on wages that employers pay to their employees. The employer is responsible, and liable, for deducting, retaining, and paying “the amount prescribed in [the] withholding instructions.” IC § 6-3-4-8(a). Like the sales tax, employers hold the withholding tax in trust for the state.

IC § 6-3-4-8(f) states in relevant part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC § 6-3 shall hold the same in trust for the state of Indiana....

In order to determine which persons are personally liable for the payment of these “trust” taxes, the Department must initially determine which parties had a duty to remit the taxes to the Department. Indiana Department of Revenue v. Safayan, 654 N.E.2d 270,273 (Ind. 1995), is instructive:

The method of determining whether a given individual is a responsible person is the same under the gross retail tax and the withholding tax.... An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department.... The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that the are paid.

The Indiana Supreme Court in Safayan identified three relevant factors:

- (1) the person's position within the power structure of the corporation;
- (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person's employment contract; and
- (3) whether the person actually exercised control over the finances of the business.

The Supreme Court also stated in Safayan that "where the individual was a high ranking officer, we presume that he or she had sufficient control over the company's finances to give rise to a duty to remit the trust taxes." Id. at 273.

The taxpayer argues and provides an affidavit stating he was not an officer of the corporation, nor was he a shareholder; rather, merely an investor without any knowledge of the corporation's operations.

The Department notes that the taxpayer signed the Business Tax Application and listed himself as president of corporation. The Department notes that the Business Tax Application states that it "*must* be signed by the owner, general partner or corporate officer...." (Emphasis added). The language of the form is heightened, noting that failure to remit sales tax or income tax withheld is a felony and also subject to a large fine. Given that the taxpayer has operated a home construction business for an extended time the taxpayer would have known from the plain language of the form that his signature would make him open to liability.

Department further notes that Safayan specifically rejects the defense of failure by an officer to exercise oversight. The taxpayer assumed responsibility for the taxes by his actions at the creation of this corporation, his alleged failure to exercise oversight does not relieve him of this responsibility.

With regard to the taxpayer's contention that other parties in the corporation owe this tax, since they signed checks for the business and entered into repayment agreements with the state for these tax liabilities, the Department notes that the officers (and others outlined by Safayan) are each personally, jointly, and severally liable. The issue of the liability of the others is not dispositive on the issue of the taxpayer's liability, and their potential liability need not be addressed here. The only relevance for the taxpayer, is any payments made by the others on this liability will accordingly reduce his liability for this

corporation's unpaid taxes for the period prior to taxpayer's notification to this department of his resignation as president in September of 1993.

FINDINGS

Taxpayer appeal is sustained for tax liability after the notification to the Department of his resignation in September of 1993 was received. Taxpayer protest is denied for all tax liability incurred by the corporation prior to the Department's receipt of taxpayer's notice of resignation.